BR-82-009-PE

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene Gomez-Bethke, Commissioner, Department of Human Rights,

complainant,

V.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

whirlpool Corporation,

Respondent.

The above-entitled matter came on for hearing before Administrative Law ,judge -Peter C. Erickson of the State Office of Administrative Hearings at 10:00 a.m., on Thursday, February 16, 1984, at the Office of Administrative Hearings, 400 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota. The record remained open through June 13, 1984 for the receipt of post- hearing briefs.

Mark B. Levinger, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. David J. Parsons from the firm of Matkov, Griffin, Parsons, Salzman and Madoff, Attorneys at Law, 100 West Monroe Street, Suite 1500, Chicago, Illinois 60603, appeared on behalf of the Respondent, Whirlpool Corporation.

NOTICE

Pursuant to Minn. Stat. sec. 363.071, subd. 2 (1983 Supp.), this Order is the final decision in this case and under Minn. Stat. 363.072 (1983 supp.), the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69 (1983 Supp.).

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether: (a) whirlpool Corporation discriminated against the Charging Party, Linda Krebsbach, when it disqualified her from employment in April of 1977; (b) Linda Krebsbach was a "deterred applicant" in April, 1978; and (c) compensatory damages should reflect Ms Krebsbach's apparent ability to work at more than one full-time job.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. the Charging Party, Linda Krebsbach, is a 33-year old woman who was married to Ricky Krebsbach on December 3, 1970. In the fall of 1973, Ms. Kresbach applied for a job at Whirlpool Corporation, located in St. Paul, Minnesota, but was not hired. I February of 1974, Mr. Krebsbach was hired as a full-time employee at Whirlpool. His father, Les Krebsbach, and brother, Greg Krebsbach, were also employed at Whirlpool.

2. in the spring of 1975 and 1976, Linda Krebsbach again inquired regarding employment at Whirlpool. However, in 1975 she accepted another job offer. In 1976, she was told by Whirlpool that they were not hiring.

3. In April of 1977, Ms. Krebsbach saw notices in the Whirlpool newsletter that the Company would be hiring student sons or daughters of current employees for jobs that were limted to summer employment. At that time, Linda Krebsbach was not a student. She did try to obtain an application for employment, however, but Whirlpool refused to give her one. Consequently, Ms. Krebsbach had a Whirlpool employee friend pick up an application for her. Because the applications were numbered and recorded, Ms. Krebsbach obliterated tne number at the bottom of the application so it could ot be traced back to the procuring employee. On the application form, Linda Krebsbach listed her husband Ricky, Greg Krebsbach and Les Krebsbach as relatives that were employed by Whirlpool.

4. After the application had been submitted, Ms. Krebsbach called the Whrlpool Personnel Department to inquire as to the status of the application. At that time, she was told by the woman who answered the ohone that whirlpool was only hiring student sons and daughters of employees and that she (Ms. Krebsbach) could not be employed anyway because her husband worked

there. Ms. Krebsbach then spoke to die Personnel Manager, Bob Hastings, who also informed her that she could not be employed because her husband was a full-time employee and also that the hiring was limited to student sons and daughters. At this time, Ms. Krebsbach was employed on a full-time basis by the United States Employees Federal Credit Union.

5. In the spring of 1977, Whirlpool only hired student sons and daughters of current employees. Applicants to were not students were rejected. However, several of the student "hires" failed to return to school in the fall of 1978 and because of the applicable union contract, remained in Respondent's employ as full-timme employees.

6. In April of 1978, Whirlpool hired at least two applicants for full-time jobs. Linda Krebsbach did not apply for a job at Whirlpool subsequent to her rejection in the spring of 1977. She was aware that the "no-spouse" hiring rule remained in effect subsequent to 1977. Ms. Krebsbach was employed full-time at the Credit Union until late 1978 when she accepted a new full-time position with the Gillette Company.

7 . From the spring of 1977 through the end of 1983, Linda Krebsbach held many different jobs, often working more than one full-time job on two different shifts. From May of 1977 through the end of 1983, Linda Krebsbach earned $84,205.04 in wages, plus $6,715 in unemployment compensation. Eight Whirlpool employees who were hired in the spring of 1977 and remained permanent employees because of their failure to return to school earned an average of $49,262 through the end of 1983. The average of the earnings of two Whirlpool employees hired in the spring of 1978 is $43,026 through the end of 1983. Whirlpool employees experienced several periods of layoff from 1977 through 1983.

8. Linda Krebsbach filed a charge of discrimination with the Minnesota Department of Human Rights on April 27, 1977. Ihis charge was served upon Whirlpool Corporation. A Complaint was issued in this matter on November 19, 1981.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. SS 14.50 and 363.071 (1982).

2. The Department of Human Rights gave proper notice of the hearing in this matter and it has fulfilled all relevant substantive and procedural requirements of law and rule.

3. Respondent Whirlpool Corporation is an employer within the meaning of Minn. Stat. sec. 363.01, subd. 15 (1976).

4. Respondent did not discriminate against Ms. Kresbach when it refused to hire her in the spring of 1977.

5. YR. Kresbach has not proved that she was a deterred applicant in the spring of 1978.

Based upon the foregoing Conclusions of law, the Administrative Law Judge makes the following:

ORDER

The Complaint herein is, in all respects, dismissed with prejudice.

Dated this 18 day of June, 1984.

PETER C. ERICKSON
Administrative Law Judge

Reported: Taped - Transcript prepared by Karen A. Toughill.

MEMORANDUM

In this matter, Complainant has alleged a violation of Minn. Stat. 363.03, subd. 1(2)(a)(1982) which reads:

> 363.03 UNFAIR DISCRIMINATION PRACTICES.
>
> Subdivision '- Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> (2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age,
>
> (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; (emphasis added)

The basis for this allegation is Respondents no-spouse hiring policy which was in effect during the periods in question, 1977 and 1978. In Solberg v. Whirlpool Corp., Slip Op. (Minn. June 29, 1983), the Minnesota Supreme Court attirmed a District Court decision which held that Respondents no-spouse hiring policy was discriminatory and not based on a bona fide occupational qualification pursuant to Rile 136.01 (2) of the Riles of Civil Appellate Procedure, citing Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979). Respondent argues that the reason for -not hiring Vt. Kresbach in 1977 was not the illegal hiring policy and that Ms. Kresbach was not a deterred applicant in 1978.

lie traditional method to prove a case of discrimination is for the Complainant to show that: (1) the Charging Party is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4)

after her rejection, the position remained open and the employer continued to seek applications from persons having similar qualifications. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Hubbard v. UPI, Inc., 330 N.W.2d 428, 442 (Minn. 1983). If this prima facie showing is made, the burden then shifts to Respondent to articulate a legitimate, non-discriminatory reason for its action. If the Respondent carries this burden, then the Complainant must show that the reason articulated is merely a pretext for discrimination. The overall burden of persuasion remains with the Complainant. Hubbard at 443.

However, the above-methodology is not the exclusive means of analyzing the evidence in a case of alleged discrimination. ben direct evidence of dis-crimiination is found by the trier of fact (in this case the statements to Ms. Kresbach by Respondent's personnel manager and a woman in the personnel office that she could not be hired because her husband was a full-time employee), then the McDonnell-Douglas does not apply. Respondent cannot refute tne alleged discrimination by a Pore articulation of a legitimate, non-discriminatory reason for its action. Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (llth Cir. 1983). The Cbmplainant must, however, also show that the direct evidence of discrimination was a significant or substantial factor in the action taken by Respondent. Perryman v. Johnson Products CO., Inc., 698 F.2d 1138, 1143 (llth Cir. 1983); Lee v. Russell County Board ot Education 684 F.2d 769, 774 (llth Cir. 1982). respondent may then only avoid liability by proving by clear and convincing evidence that the action taken would have been taken even in the absence of discrimination. League of United Latin American Citizens V. City of Salinas Fire Department, 654 F.2d 557, 558-559 (9th Cir. 1981); Day v. Matthews, 530 F.2d 1083, 1085 (D.C. Cir. 1976); Marotta v. Usery, 62 F. 615, 618 (9th Cir. 1980).l

In Bell, supra, the direct evidence was a statement by the supervisor, who promoted a man over a more senior woman, that if he let one woman into a par-ticuar work area, then all women employees would want to get into that work area. In Perryman, supra, the direct evidence consisted of a statement by a district sales manager responsible for promotions, that women had been 'rotten eggs' as sales reps and that the company was seeking men. In this case, the statements made by Mr. Hastings and a personnel department employee to Ms. Kresbach regarding the no-spouse hiring policy are direct evidence of dis-crimination. Although only Ms. Kresbach testified as to these statements and Mr. Hastings could not be located to testify, the Administrative Law Judge has

believed the Charging Party's testimony. Respondent does not contend that it did not have a no-spouse hiring rule during this period of time or that such statements would not have been made to Ms. Kresbach.

In order to complete its proof of discrimination, Cbmplainant must additionally show that the statements made by Respondent constituted a significant or substantial factor in the failure to hire Ms. Kresbach. The

1 The Administrative Law Judge is aware that the llth Circuit has adopted a preponderance test to prove this part of Gm analysis (Bell supra; Perryman, supra). However, the Court in the llth Circuit relied upon a United States Supreme court case involving the alleged unconstitutional discharge of a teacher (alleged violations of the First and Fourteenth Amendments) rather than a Title VII claim. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977). The Administrtive Law Judge is of the opinion that the heavier, clear and convincing evidence burden is appropriate since once discrimination is shown relief should be sparingly denied. Day at 1086; see, also, State v. CENCOR, Inc., (HR-83-018-GB, Decision issued January 11, l984)

record in this matter shows, however, that in the spring of 1977, respondent only hired student sons or daughters of permanent employees. There were no non-student hires at that time. then Ms. Kresbach was told why she would not be hired, the fact that she was not a student was listed as a reason along with the fact that her husband was a full-time employee. Thus, respondent had considered Ms. Kresbach's lack of qualifications for the job, i.e., that she was not a student. because of that factor alone, she would not have been hired. Although the discriminatory reason for not hiring the Charing Party was given by respondent, the administrative law Tudge does not conclude that it was a significant or substantial factor in Respondent's decision. Absent the no-spouse rule, Ms. Kresbach would not have been hired regardless of any job-related (qualifications she may have possessed because she was not a student. respondent was only looking for students to employ at that time so that was the first qualification that was considered.

Complainant next contends that Ms. Kresbach was a deterred applicant in the spring of 1978. 95is is based on Ms. Kresba&Cs testimony that she was aware that the no-spouse rule remained in effect after 1977, however, her interest in employment at Whirlpool continued. Complainant cites Teamsters v. United States, 431 IS. 324 (1977) as authority for its "deterred applicant" argument. in Teamsters, the United States Supreme Court stated:

> .A consistently enforced discrimination policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection . . . when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application. 431 U.S. at 365-366.

Regarding the type of proof required to show deterred applicant status, the Court wrote:

> while the most convincing proof would be some overt act such as an application for a line driver job, the District Court may find evidence of an employee's formal inquiry, expression of interest, or even unexpressed desire credible and convincing. !tie question is a factual one for determining by the trial judge. 431 U.S. at 371 n. 58.

The record in this matter shows that in April of 1978, Ms. Kresbach was working full-time for the Federal Employees Credit Union. There is no evidence that the Charging Party was looking for other employment at that time or that she did any checking at Whirlpool regarding available jobs or the continuation of the no-spouse policy. Although the record also demonstrates that

Ms. Kresbach often worked more than one job at a time and changed jobs frequently, the administrative Law Judge has not been persuaded that Ms. Kresbach was a deterred applicant in the spring of 1978.2 Additionally, even if Ms. Kresbach were found to be a deterred applicant, the record only shows that two persons were hired by whirlpool in April of 1978 for full-time positions. there is nothing to show that Ms. Kresbach would have been hired or even considered for employment if she had applied at that time absent the no-spouse policy.3

Because of the foregoing discussion, damage issues need not be addressed herein.

P.C.E.

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2 In the case of State v. Kraft, Inc., HR-77-035-PE (Decision issued July 1, 1982) this Administrative Law Judge stated that, "in order to show deterred applicant status, the Hearing Examiner has required that class members show that they made direct inquiry to Kraft about a full-time position and/or applied to other employers for full-time work and were in a position to assume full-time employment

3 In Kraft, Inc. v. State, File No. C82-607 (5th Judicial. District, November 11, 1983), District Court Judge Noah S.. Rosenbloom stated that for each individual shown to be a deterred applicant, "the Commissioner must show there was an opening for which the applicant was qualified, in which he or she was interested, and for which the applicant could have applied and would have been considered during the applicable limitations periods to sustain back pay

awards and seniority relief". Id. at 7.